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No. 01-

IN THE

Supreme Court of the United States

PHILIP F. POSTLEWAITE,

Petitioner,

v.

McGRAW-HILL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Which of the several standards articulated by the Circuit Courts of Appeals is properly applied to determine whether an arbitration award should be vacated when the claim is raised that an arbitrator acted in "manifest disregard of the law?"

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Petitioner, Philip F. Postlewaite ("Postlewaite"), respectfully petitions this Court for a writ of certiorari to review the summary affirmance of the United States Court of Appeals for the Second Circuit in *Postlewaite v. McGraw-Hill, Inc.*

OPINIONS BELOW

The opinion of the Court of Appeals of the Second Circuit (App., *infra*, 1a-2a) was not reported, but is available on Westlaw at 2001 WL 505972 (2d Cir. 2001). The opinion of the District Court for the Southern District of New York (App., *infra*, 3a-13a) was not reported, but is available at 1998 WL 751687 (S.D.N.Y. 1998). The order of the Court of Appeals of the Second Circuit denying rehearing and rehearing en banc (App., *infra*, 14a-15a) was not reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered May 11, 2001. App., *infra*, la. A timely petition for rehearing was denied on June 19, 2001. App., *infra*, 14a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Postlewaite sought damages for breach of contract from Respondent, McGraw-Hill, Inc. ("McGraw-Hill"). As required by his Publishing Agreement ("Agreement"), he filed for arbitration in February 1997. His Breach of Contract Claim turned on McGraw-Hill's failure to pay a royalty from the consideration it received upon the assignment of his Agreement to another publisher.

McGraw-Hill sold the Agreement *and* the attendant Copyright along with various other assets, including approximately 280 other publishing agreements, for approximately $35,000,000 on December 28, 1995. The assignment of the Copyright for the Work was registered by the purchaser in the United States Copyright Office on February 16, 1996.

At the heart of the contractual dispute was the royalty provision of the Agreement. Section 7(a) enumerated the transactions, including the sale of "any rights to the Work," which generated royalties for the author, while Section 7(b) enumerated those transactions which were excluded from the payment of a royalty.

McGraw-Hill denied its liability, asserting that the sale of rights clause did not apply because the transaction was governed exclusively by the assignment, not the royalty, provision of the Agreement which did not expressly provide for a royalty. The issue as joined was whether the assignment provision of the Agreement, which was silent as to the payment of a royalty, overrode the sale of rights royalty clause which expressly provided for the payment of a royalty upon the "assignment . . . of any rights to the Work."

Postlewaite filed a Motion for Summary Judgment with the arbitrators on June 6, 1997 alleging that there was no genuine issue as to any material fact. Because the provisions of the Agreement were clear and unambiguous, Postlewaite was entitled to a decision in his favor *as a matter of law* based upon well-defined and clearly-established principles under the contract law of New York. Nevertheless, the arbitrators denied his Motion for Summary Judgment at the preliminary hearing on August 4, 1997.

Thereafter, Postlewaite in his Brief and Oral Argument at the arbitration hearing, as he had done in his Motion for Summary Judgment, asserted his entitlement to a royalty *as a matter of law.* Postlewaite informed the arbitrators of the fundamental principles applicable to the law of contracts in New York (i.e., the terms of the contract are controlling unless ambiguous, extrinsic evidence is inadmissible without an ambiguity, the doctrine of *exclusio unis*, ambiguities are construed against the drafter, and industry custom and practice is inadmissible if a party is unaware of such). The plain language of the Agreement was unambiguous and, *as a matter of New York law*, was to be enforced as written. Nevertheless, the arbitrators permitted testimony to be introduced regarding industry custom and practice. On October 29, 1997, the arbitrators ruled against Postlewaite and issued an award without written opinion or explanation.

In litigation commenced before and concluded after the issuance of the arbitration award, three authors who had entered publishing agreements with McGraw-Hill, sold in the same transaction and possessing royalty provisions identical to that of Postlewaite's Agreement, filed separate suits in Colorado. In all three actions, the courts, including two separate three-judge panels of the Colorado Court of Appeals, *unanimously and as a matter of law* held that McGraw-Hill was liable for breach of contract because it failed to pay a royalty from the consideration received. *See Augusta Software v. Shepard's/McGraw-Hill, Inc.*, No. 99 CA 0121 (Colo. Ct. App. 2000), *cert. denied* (2001), and *Kelley v. Shepard's/McGraw-Hill, Inc.*, No. 98 CA 2197 (Colo. Ct. App. 1999), *cert. denied* (2000). *Accord Schmidt v. Shepard's/McGraw-Hill, Inc.*, No. 96 CV 1731 (Colo. Dist. Ct. 2000).

Postlewaite timely filed a motion in the Federal District Court for the Southern District of New York to vacate the arbitration award because the arbitrators, *inter alia*, "manifestly disregarded the law." The District Court had jurisdiction over the matter pursuant to 28 U.S.C. § 1332 and 9 U.S.C. § 10. The decision of the arbitrators involved no genuine issue as to any material fact and was limited solely to questions of contract interpretation. As confirmed by the Colorado decisions addressing the identical issue, the application of the contract law of New York, *as a matter of law*, could only result in a decision in an author's favor.

Nevertheless, the court denied Postlewaite's Motion to Vacate without considering whether the contractual principles of New York law upon which Postlewaite relied were well-defined and, if applied, would have resulted in a decision in his favor. Instead, *in conflict with other standards utilized by various Circuit Courts of Appeals for evidencing that an arbitrator "manifestly disregarded the law,"* it held that the award could be vacated only if there were "no colorable basis" for the arbitrators' decision. That standard varies dramatically from the other four standards applied by the Circuits in the amount and type of evidence required for determining whether an arbitrator "manifestly disregarded the law."

After reiterating McGraw-Hill's arguments to the arbitrators, i.e., that the assignment of the Agreement merely replaced publishers, that an assignment of an entire agreement might be treated differently than an assignment of a particular component right, and that its interpretation of the Agreement was consistent with industry custom and practice, the District Court concluded that there was a "colorable basis" for the award. *Postlewaite v. McGraw-Hill, Inc.*, No. 99-7032, 1998

WL 751687 (S.D.N.Y. 1998), *affirmed by summary order*, 2001 WL 505972 (2d Cir. 2001). The Second Circuit issued a summary affirmance without discussion or analysis of the contract law of New York, whether it was well-defined, and whether, if applied, it would have resulted in a decision for Postlewaite.

This Court has twice referenced "manifest disregard of the law" as a non-statutory ground for vacating an arbitration award under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. Although all of the Circuits have adopted this non-statutory ground, some have lamented the lack of direction and specification by this Court. The Circuits have adopted differing formulations as to what a movant must show, varying dramatically in the amount and type of evidence required, for success. Thus, there is a split among the Circuits as to the governing standard. Guidance and clarification by this Court is necessary as to what a movant must show to demonstrate that an arbitrator acted in "manifest disregard of the law."

Each of the Circuits has adopted one or more of five different standards. Within some Circuits, different panels have applied different standards. Under those standards, an arbitrator "manifestly disregards the law" if: (1) the arbitrator's decision "violated the law;" (2) there was "no colorable basis" for the arbitrator's award; (3) the arbitrator "intentionally ignored well-defined law;" (4) the arbitrator "disregarded well-defined law resulting in significant injustice;" and (5) the arbitrator's decision was "one at which no court would arrive." *See* Appendix D, 16a.

The "violates the law" standard is the most burdensome of the five on a movant, particularly in a contract dispute

since it is virtually impossible for an arbitration award to do so. No Circuit has ever vacated an award on this basis.

The "no colorable basis" standard, which was applied in *Postlewaite,* is almost as burdensome and nearly impossible to meet in a contractual dispute. No Circuit has ever vacated an award on this basis.

The other three standards, "intentional disregard of well-defined law," "disregard of well-defined law resulting in significant injustice," and "no court would arrive at that result," comport with the *raison d'etre* behind the non-statutory judicial safeguard for vacating an arbitration award. The latitude granted an arbitrator in deciding factual disputes is practically boundless. However, when an arbitration proceeding involves the application of legal principles brought to the attention of the arbitrator by the parties, the courts have an interest in ensuring that such principles are properly applied.

It is imperative that this Court firmly, and with finality, articulate the standard through which the lower courts must consistently and fairly determine, and the moving party illustrate, that an arbitrator "manifestly disregarded the law." Without such articulation, a movant may receive different treatment depending upon the Circuit, and in some cases the panel within a particular Circuit, before which the motion to vacate an arbitration award is brought.

To maintain the integrity of the alternative dispute resolution system and to ensure its continued use, it is essential that this Court confirm the existence and define the scope of this non-statutory safeguard. Without the certainty that a rogue arbitrator in a proceeding involving

legal, as opposed to factual, disputes will not be allowed to produce a result which conflicts with established law, potential disputants will refuse to agree to arbitration.

REASON FOR GRANTING THE WRIT

In Order To Provide Uniform Guidance for the Lower Courts and To Ensure Consistency and Fairness in the Judicial Review of Arbitration Awards, This Court Should Resolve the Existing Split in the Circuits Over the Governing Standard for Determining If an Arbitrator Has Acted in "Manifest Disregard of the Law."

This Court has acknowledged that, in addition to the grounds provided in 9 U.S.C. § 10, arbitration awards can be vacated if an arbitrator acts in " 'manifest disregard' of the law." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). *See also Wilko v. Swan*, 346 U.S. 427, 436 (1953). By agreeing to arbitration, a party does not forfeit his right to a decision in accordance with governing and controlling legal principles. In the context of statutory rights, this Court has warned that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). A similar approach should be required of an arbitration proceeding involving non-statutory rights.

An arbitrator is not free to "dispense his own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). If an arbitrator can arrive at any result, regardless of the

certainty of the governing legal principles, disputants will refuse arbitration. Thus, without this judicial safeguard, the national policy favoring arbitration will be undercut.

The District of Columbia Circuit has indicated confusion in the articulation of the "manifest disregard of the law" doctrine. *See Cole v. Burns International Security Services*, 105 F.3d 1465, 1486 (D.C. Cir. 1997), wherein the court stated that "this term has not been defined by the Court, and the circuits have adopted various formulations, . . ." Additionally, the Seventh Circuit has lamented the lack of direction by this Court on the issue: "The law in other circuits is similarly confused, doubtless because the Supreme Court has been opaque. The dictum in *Wilko* and *First Options* was unexplained and unilluminated by any concrete application." *See George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 580 (7th Cir. 2001).

Each of the Circuits has adopted one or more of five different standards. Within some Circuits, different panels have applied different standards. Under those standards, an arbitrator "manifestly disregards the law" if: (1) the arbitrator's decision "violated the law;" (2) there was "no colorable basis" for the arbitrator's award; (3) the arbitrator "intentionally ignored well-defined law;" (4) the arbitrator "disregarded well-defined law resulting in significant injustice;" and (5) the arbitrator's decision was "one at which no court would arrive." *See* Appendix D, 16a.

This Court should fashion a single standard for determining whether an arbitrator has acted in "manifest disregard of the law" in order to resolve this split in the Circuits. This Court should provide needed guidance for the lower courts and the parties involved in arbitration

proceedings in order to ensure consistency and fairness in the application of the doctrine. Only with the adoption of a single uniform standard will the national policy favoring arbitration be advanced. Without the certainty that an arbitrator must produce results consistent with well-defined law, potential disputants will refuse to submit their claims to arbitration, thereby further burdening a judiciary already struggling with an over-crowded docket.

A. Circuits Utilizing a "Violates the Law" Standard.

The Seventh Circuit's latest pronouncement advances a "violates the law" standard for determining whether an arbitrator "manifestly disregarded the law." *See George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 581 (7th Cir. 2001), holding that the doctrine "is limited to . . . an arbitral order requiring the parties to violate the law. . . ."

In formulating the standard, the Seventh Circuit focused on the difficulty and uncertainty in selecting the type of legal error prerequisite to such a showing, e.g., mere legal error, clear legal error, or something more. It stated:

> If "manifest disregard" means only a legal error, however, then arbitration cannot be final. Every arbitration could be followed by a suit, seeking review of legal errors, serving the same function as an appeal within a unitary judicial system. . . . If "manifest disregard" means not just any legal error but rather a "clear" error (one about which there is . . . "no reasonable debate"), again arbitration could not be final, and the post-arbitration litigation would be even more complex

> than a search for simple error — for how blatant a legal mistake must be to count as "clear" or "manifest" error lacks any straightforward answer.

Id. at 579. Because the parties to an arbitration proceeding authorize the arbitrator to act as their agent, the Seventh Circuit held that virtually any compromise solution on a dispute is permissible without regard to governing legal principles as long as it does not "violate the law."

The standard is a particularly onerous (and in the context of a contractual dispute a virtually impossible) one through which to evidence that an arbitrator "manifestly disregarded the law." Utilizing the "violates the law" standard, a reviewing court could not conclude that an arbitrator "manifestly disregarded the law" in *Postlewaite*. Postlewaite and McGraw-Hill could have agreed that he was not entitled to a royalty notwithstanding the contractual provision to the contrary. Because the arbitrators are considered to have been the agents of Postlewaite and McGraw-Hill and because their finding did not violate the law, the award would not be vacated under the "violates the law" standard.

B. Circuits Utilizing a "No Colorable Basis" Standard.

In *Postlewaite*, the District Court and the Second Circuit utilized a "no colorable basis" standard for determining whether the arbitration award should be vacated. *See also Willemijn Houdstermaatschappij, B.V. v. Standard Microsystems Corp.*, 103 F.3d 9, 13 (2d Cir. 1997), in which the court stated that if "there is 'even a barely colorable justification for the outcome reached,' the court must confirm the arbitration award."

A number of circuits employ a similar standard. For example, the Third Circuit utilizes a "no support for the arbitrator's determination" standard. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1291 (3d Cir. 1996), wherein the court stated that it "may only vacate an award if it is entirely unsupported by the record." The Federal Circuit and the Ninth Circuit have concluded that an arbitrator's award may be vacated only if it is "completely irrational." *See Flex-Foot, Inc. v. CRP Inc*, 238 F.3d 1362, 1366 (Fed. Cir. 2001); *Barnes v. Logan*, 122 F.3d 820, 825 (9th Cir. 1997). The Tenth Circuit will vacate an award if "it is 'so unfounded in reason and fact, so unconnected with the wording and purpose of the . . . agreement.' " *Oklahoma Fixture Co. v. Local 942 International Brotherhood of Carpenters and Joiners of America*, 114 F.3d 1198, 1997 WL 311907 at *1 (10th Cir. 1997).

The "no colorable basis" standard conflicts with the purpose of the "manifest disregard of the law" test, because it does not inquire as to whether the arbitrator's decision comports with established law. Instead, the "no colorable basis" standard focuses on whether an arbitrator did anything right, while the other four standards focus on whether the arbitrator did anything wrong.

The "no colorable basis" standard is no standard at all. As long as the prevailing party advanced any argument, regardless of merit, the standard appears to be satisfied. By definition, if the arbitrator selects one of the two positions placed before him or her, regardless of how unsound that position is under established legal principles, there is a "colorable basis" for the decision because *some* support exists for the award. In fact, no movant has ever successfully vacated an arbitration award in a Circuit Court of Appeals utilizing the "no colorable basis" standard.

In *Postlewaite*, the District Court and the Second Circuit repeated McGraw-Hill's arguments to the arbitrators as evidence that they had a "colorable basis" for their award. At no point did either court review the well-defined and established contract law of New York. Had they done so, they would have concluded, as did the Colorado courts, that the Agreement was unambiguous, that under the doctrine of *exclusio unis* a royalty was owing, and that the introduction of testimony regarding industry custom and practice was improper since there was no showing that McGraw-Hill's authors were aware of any such custom and practice.

C. Circuits Utilizing an "Intentional Disregard of Well-Defined Law" Standard.

The "intentional disregard of well-defined law" standard is the most prevalent in use among the Circuits. In order to vacate an arbitration award under that standard, the Second Circuit has stated that a court must find "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *See Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998).

A number of other circuits have adopted this approach. The Fourth Circuit, Sixth Circuit, and Tenth Circuit utilize this standard. *See Remmey v. Painewebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994); *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000); and *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995), in which the court characterized the standard as " 'willful inattentiveness to the governing law.' "

The First Circuit, District of Columbia Circuit, Eighth Circuit, and Eleventh Circuit have been similarly inclined. *See Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 331 (1st Cir. 2000); *LaPrade v. Kidder Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001); *Kiernan v. Piper Jaffray Companies, Inc.*, 137 F.3d 588, 594 (8th Cir. 1998), and *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997).

In his Motion for Summary Judgment and in his Brief and Oral Argument, Postlewaite informed the arbitrators of the fundamental principles applicable to the law of contracts in New York (i.e., the terms of the contract are controlling unless ambiguous, extrinsic evidence is inadmissible without an ambiguity, the doctrine of *exclusio unis*, ambiguities are construed against the drafter, and industry custom and practice is inadmissible if a party is unaware of such). These submissions clearly satisfied the first prong of the "intentional disregard of well-defined law" standard requiring knowledge by the arbitrators of the governing legal principles, which they nonetheless disregarded by finding in favor of McGraw-Hill.

The uniform and unanimous judgment of the Colorado judiciary to the contrary when confronting the identical issue dramatically demonstrates how "well defined, explicit, and clearly applicable" the fundamental legal principles of the New York law of contracts were in *Postlewaite*. *See Augusta Software v. Shepard's/McGraw-Hill, Inc.*, No. 99 CA 0121 (Colo. Ct. App. 2000), *cert. denied* (2001); *Kelley v. Shepard's/McGraw-Hill, Inc.*, No. 98 CA 2197 (Colo. Ct. App. 1999), *cert. denied* (2000); *Schmidt v. Shepard's/ McGraw-Hill, Inc.*, No. 96 CV 1731 (Colo. Dist. Ct. 2000). Two separate three-judge panels of the Colorado Court of

Appeals unanimously rejected, *as a matter of New York law*, all of the arguments made by McGraw-Hill at the arbitration proceeding. Thus, the second prong of the "intentional disregard of well-defined law" standard was met as well.

Arbitrators, interpreting a contract so clear on its face that summary judgment in favor of the author was required, could not arrive at a contrary result without acting in "manifest disregard of the law." Unanimous judgments of the courts in identical disputes can only be reconciled with the arbitrators' decision in *Postlewaite* by concluding that they acted in "manifest disregard of the law." Had this standard been applied in *Postlewaite*, the arbitration award would have been vacated.

D. Circuits Utilizing a "Disregard of Well-Defined Law Resulting in Significant Injustice" Standard.

The Fifth Circuit employs a variation of the "intentional disregard of well-defined law" standard. *See Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999). Borrowing from a leading treatise on the law of arbitration, the Fifth Circuit modified the "intentional disregard of well-defined law" standard. *See* Ian R. Macneil, *et al.*, 4 Federal Arbitration Law, S40.7.2.6, at 40:95 (Supp. 1999).

While maintaining the "disregard of well-defined law" component, it eliminated the requirement that an arbitrator "intentionally" disregard it. Instead, it substituted a requirement that an arbitrator's disregard of the well-defined law result in "significant injustice." Accordingly, the Fifth Circuit instructed:

> First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld. Second, where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between the parties.

Id. at 762.

If a reviewing court applied the "disregard of well-defined law resulting in significant injustice" to Postlewaite's claim, the result would be uncertain. While the law in *Postlewaite* was well-defined and disregarded by the arbitrators, the Fifth Circuit in *Williams* never reached the issue of what constitutes "significant injustice."

E. Circuits Utilizing a "No Court Would Arrive at That Result" Standard.

A fifth formulation of the "manifest disregard of the law" standard inquires as to whether the reasoning of the arbitrators was so faulty that no court could conceivably arrive at the same conclusion. The Sixth Circuit has employed such a formulation where, as in *Postlewaite*, the arbitrator did not issue a written opinion explaining his or her decision.

In *The Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, 205 F.3d 1340, 2000 WL 178554 *3 (6th Cir. 2000), the court stated that:

> When the arbitrators do not explain their resolution of certain questions of law, the award must be confirmed if the court can find any line of argument that is legally plausible and supports the award. . . . Only if "no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside."

Accord Buchignani v. Vining-Sparks IBG, 208 F.3d 212, 2000 WL 263344 at *2 (6th Cir. 2000). *See also Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234, 238 (1st Cir. 1995), stating that "a 'successful challenge [under "manifest disregard of the law"] depends upon the challenger's ability to show that the award is . . . based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; . . .' "

Because none of these precedents vacated an arbitration award under this standard, one can only speculate how a reviewing court applying this standard would have decided *Postlewaite*. Logically, two separate opinions of three-judge panels of the Colorado Court of Appeals unanimously concluding that McGraw-Hill was liable to its authors *as a matter of law* should be sufficient to evidence that "no court would arrive at [the] result" reached by the arbitrators. If so and if this standard had been applied in *Postlewaite*, the arbitration award would have been vacated.

CONCLUSION

As evidenced by the above discussion, this Court should resolve the split among the Circuits and adopt a single standard for uniform application through which to determine whether an arbitrator "manifestly disregarded the law."

The five standards currently employed by the Circuits yield different results when applied to a setting such as that presented in *Postlewaite*.

Under either the "no colorable basis" standard or the "violate the law" standard, the arbitration award in *Postlewaite*, and in virtually all cases, would be confirmed. No arbitration award has ever been vacated by a Circuit Court of Appeals utilizing either standard. If either of these standards is selected by this Court as the governing standard for determining whether an arbitrator "manifestly disregarded the law," the non-statutory basis for vacating an arbitration award effectively will be rendered meaningless and illusory.

If a reviewing court applied the "disregard of well-defined law resulting in significant injustice" standard to Postlewaite's claim, the result would be uncertain. While the law in *Postlewaite* was well-defined and disregarded by the arbitrators, what constitutes "significant injustice" is unclear. The standard produces an interpretive dilemma, i.e., what constitutes "injustice" and, once determined, what constitutes "significant injustice," which no Circuit has addressed.

The adoption by this Court of the "intentional disregard of well-defined law" standard or the "no court would arrive at that result" standard would fulfill this Court's objective in creating a judicial safeguard for arbitration proceedings while still respecting the integrity of the arbitration process. Had they been applied in *Postlewaite*, the arbitration award would have been vacated.

Without protection against a rogue arbitrator whose award conflicts dramatically with well-defined law,

disputants will avoid the use of arbitration. A party to an arbitration agreement does not believe that, by agreeing to arbitration, he or she authorizes an arbitrator to "dispense his own brand of industrial justice." *United Steelworkers, supra*, at 597. The more certain the governing legal principles and the less factual the dispute, the more the parties logically expect that an arbitrator will arrive at the result that would have been reached by a court had the dispute been litigated. An arbitration award to the contrary must be vacated by a reviewing court because the arbitrator has acted in "manifest disregard of the law."

Respectfully submitted,

PHILIP F. POSTLEWAITE
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Petitioner Pro Se

APPENDIX



APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 11, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Eleventh day of May two thousand one.

Present: HONORABLE THOMAS J. MESKILL,
HONORABLE AMALYA L. KEARSE,
HONORABLE SONIA SOTOMAYOR,
Circuit Judges.

No. 99-7032

PHILIP F. POSTLEWAITE,

Petitioner-Appellant,

– v. –

McGRAW HILL, INC., a New York Corporation,

Respondent-Appellee.

* * *

Appendix A

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the record from the United States District Court for the Southern District of New York, and was argued by petitioner *pro se* and by counsel for respondent.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed substantially for the reasons stated in Judge Stanton's Opinion and Order dated October 26, 1998, rejecting petitioner's challenges to the arbitration award, and in his endorsed order dated November 3, 1999, denying petitioner's motion pursuant to Fed. R. Civ. P. 60(b) for relief from the judgment.

We have considered all of petitioner's contentions on this appeal and have found in them no basis for reversal. The judgment and order of the district court are affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE,
Clerk
by:

s/ Lucille Carr

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 26, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 0611 (LLS)

PHILIP F. POSTLEWAITE,

Petitioner,

– against –

McGRAW-HILL, INC.,

Respondent.

OPINION AND ORDER

Philip Postlewaite moves to vacate an arbitration award. McGraw-Hill cross-moves to confirm the award and for judgment on that award in its favor.

BACKGROUND

All of the facts leading up to the arbitration are undisputed. Petitioner is a tax professor at Northwestern University School of Law. He entered into a Publishing Agreement (the "Agreement") with respondent for the publication of a taxation treatise he co-authored. The Agreement has a royalties provision (§ 7), which is the subject of this dispute. § 7(a)(3) states:

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> *Sale of Other Rights by Publisher.* 20 percent of the Publisher's gross receipts from the sale, assignment, or licensing to others by the Publisher of any rights to the Work or any part of the Work or upkeep service prepared by the Authors shall be paid to the Authors.

In 1995, McGraw-Hill sold all of the assets in its Shepard's Topical Publishing Division ("Shepard's") to Thomson Legal Publishing, Inc. ("Thomson"). Among the assets were approximately 280 publishing agreements, including Postlewaite's. Postlewaite consented to assignment of the Agreement in writing in accordance with § 13 of the Agreement (its assignments section). McGraw-Hill wrote Postlewaite stating "We request your consent to assign your publishing agreement to Thomson as part of Thomson's acquisition of Shepard's Topical Publishing Business." Resp't's Notice of Cross-Motion, Ex. 1. The letter stated that Shepard's would continue to pay Postlewaite's royalties until the sale of assets transaction was complete and then Thomson would take over all obligations under the Agreement, including the payment of royalties. Postlewaite signed the "assignment of the Publishing Agreement" without making any changes.

Postlewaite then claimed that the sale of assets to Thomson constituted a sale of rights to his treatise, thereby entitling him to royalties under § 7(a)(3). McGraw-Hill's position was that the sale of all of Shepard's assets was a transfer of its obligations under the Agreement and that Thomson merely took its place, not that any rights in the treatise had been sold or assigned. The case went to

arbitration, American Arbitration Association Arbitration No. 13-161-00241-97.

After a preliminary session at which the arbitrators denied Postlewaite's motion for summary judgment and granted four or five of his 21 discovery requests to which he says McGraw-Hill consented, they held a hearing on the merits of the case. After that hearing, but before the award was announced, McGraw-Hill discovered that one of the arbitrators, Philip M. Cowan, had given a legal opinion to an opponent of McGraw-Hill's in a different proceeding involving the same issue. That opinion supported Postlewaite's legal position. McGraw-Hill stated that in view of his prior expression of opinion Cowan could not be impartial, and petitioned the AAA for nullification of the proceeding and rehearing by a new panel. McGraw-Hill asked Postlewaite if he would consent to that, but he refused. The AAA denied McGraw-Hill's request. The same day, the arbitrators signed a unanimous three-to-zero decision, giving no reasons, but finding in favor of McGraw-Hill denying any royalty for the sale of assets. The award was released the next day.

Postlewaite moves for vacation of the award on various grounds, and McGraw-Hill cross-moves for its confirmation.

DISCUSSION

"Judicial review of arbitration awards is necessarily narrowly limited." *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 19 (2d Cir. 1997). The party challenging the award "bears a heavy burden of proof," *Folkways Music Publishers,*

Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993), and "the showing required to avoid summary confirmation is high." *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987).

A court will vacate an arbitration award if the arbitrators acted in "manifest disregard of the law" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986); *see also Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S. Ct. 182, 187-88 (1953), or under one of the conditions listed in 9 U.S.C. § 10(a):

> (1) Where the award was procured by corruption, fraud or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

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Petitioner invokes both the "manifest disregard" standard and the statute.

A. Manifest Disregard of the Law

Petitioner states that the Agreement, on its face, so clearly mandated a decision in his favor, that the arbitrators' finding for respondent was in manifest disregard of the law.

Postlewaite insists that § 7(a)(3) states that he will receive royalties upon the sale or assignment of *any* rights, and that when McGraw-Hill sold its assets, it sold and assigned all the rights to his book. The section that sets forth sales and assignments for which royalties will not be due, § 7(b), does not include an assignment of the entire Agreement. Therefore, petitioner claims that the arbitrators ignored clearly established rules of contract interpretation.

However, "manifest disregard" means more than just factual or legal error:

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decided to ignore or pay no attention to it.

Merrill Lynch, 808 F.2d at 933. A less stringent standard would undermine the deference given to arbitration. *See id.*

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"It is difficult to apply this standard of review when arbitrators give no explanation for their decision." *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997). Therefore, the court "must confirm the arbitrators' decision if a ground for the arbitrators' decision can be inferred from the facts of the case. This is so even if the ground for their decision is based on an error of fact or an error of law." *Willemijn*, 103 F.3d at 13 (quotations omitted). The justification need only be "barely colorable." *Id.*

"[T]his court has generally refused to second guess an arbitrator's resolution of a contract dispute." *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (quoting *John T. Brady & Co. v. Form-Eze Sys., Inc.*, 623 F.2d 261, 264 (2d Cir. 1980)). *See Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960) ("the misapplication — if it be that — of such rules of contract interpretation does not rise to the stature of a 'manifest disregard' of the law"). The court may not vacate an arbitration award simply because it disagrees with the arbitrators' interpretation. *See Yusuf*, 126 F.3d at 25.

Postlewaite suggests that because the language of § 7 is unambiguous, trade practices and the effect of the assignment clause in § 13 are irrelevant to whether he should have received royalties. But, as stated in *Albany Savings Bank, FSB v. Halpin*, 117 F.3d 669, 673 (2d Cir. 1997) (quotations omitted):

> We have defined ambiguous language as that which is capable of more than one meaning when

> viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

In that light, there is more than a "colorable" reason for the arbitrators' decision. They could have found that the assignment of the entire Agreement to Thomson merely replaced McGraw-Hill with Thomson. Thomson continued to pay royalties to Postlewaite and had all the obligations of the Agreement. The assignment provision in § 13 indicated that a sale or assignment of the Agreement as a whole might be treated separately from the sale or assignment of particular component rights.[1] Finally, there was evidence that such terms were standard in the industry, and had not previously been interpreted in the manner suggested by Postlewaite.

Thus, it cannot be said that the arbitrators acted in manifest disregard of the law.

---

1. § 13 states:

> This Agreement may not be assigned by either the Authors or the Publisher without the prior written consent of the other party or parties, which shall not be unreasonably withheld. This Agreement shall be binding on the parties signing it and on all their heirs, legal representatives, successors, and permitted assignees.

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B. Denial of Discovery

Postlewaite claims that when he asked for discovery at the preliminary hearing, the arbitrators asked McGraw-Hill what it would be willing to give him, and then denied the rest of his requests. McGraw-Hill states that the arbitrators did not merely rubber-stamp its responses, but conducted a full hearing which resulted in the granting of five of the requests and denial of the other sixteen.

Postlewaite states that if the arbitrators had granted his request to "produce relevant and material information," respondent would have been forced to reveal that it had entered into contracts with third-parties that contained clauses specifically excluding the granting of royalties to authors when McGraw-Hill engages in a sale of assets such as its sale of the Shepard's division to Thomson ("exclusionary clause"). Petitioner argues that if he could have presented the arbitrators with contracts that included such a clause, it would have undercut McGraw-Hill's argument that his contract had the same meaning without it.

Accordingly, Postlewaite moves to vacate the arbitration award under 9 U.S.C. §§ 10(a)(3) and 10(a)(4) because the denials prejudiced his rights and represent an imperfect execution of the arbitrators' powers.

Arbitrations are not subject to the same rules of pre-trial discovery as a case in court. However, arbitrators have an "affirmative duty . . . to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other side before the hearing is closed."

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Chevron Transp. Corp. v. Astro Vencedor Compania Naviera, S.A., 300 F. Supp. 179, 181 (S.D.N.Y. 1969). *See also Home Indemnity Co. v. Affiliated Food Distribs., Inc.*, 1997 WL 773712, at *5 (Dec. 12, 1997). "A party moving to vacate an arbitration award on the ground that the arbitrators failed 'to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other side' must show some resulting prejudice." *Konkar Maritime Enter., S.A. v. Compagnie Belge D'Affretement*, 668 F. Supp. 267, 274 (S.D.N.Y. 1987) (quoting *Chevron*, 300 F. Supp. at 181). Without evidence of clear prejudice, the party moving to vacate an arbitration award has not met its burden. *See Cole Publ'g Co., Inc. v. John Wiley & Sons, Inc.*, 1994 WL 532898, at *7 (Sept. 29, 1994).

Postlewaite did not suffer the type of prejudice required to vacate the award.

Respondent states that two witnesses, William P. Farley and Susan Winter, testified at the arbitration hearing that there were contracts with specific clauses excluding a sale of assets from the royalty requirement, and they testified that the clauses were added, not because the contracts were unclear or required royalties without them, but because Postlewaite's case and others had provoked the change. *See* Decl. of William P. Farley, executed June 29, 1998, ¶ 4. Postlewaite denies that Farley testified to McGraw-Hill adding an exclusionary clause, and states that Farley testified that McGraw-Hill had never utilized an exclusionary clause and did not plan to do so. *See* Pet'r's Br. at 25-26. However, Postlewaite agrees that Winter did testify to the existence of

agreements with exclusionary clauses. He says that Winter's testimony came as a surprise to him.

While it might have been helpful to have documents at the hearing, the testimony put Postlewaite in the same position as the documents would: the arbitrators knew that McGraw-Hill had written agreements with an exclusionary clause, enabling Postlewaite to argue that its absence from his contract meant that sales of assets were included in the royalties obligation. The weight of the evidence would have been no different with the actual agreements.

C. "Deception" by McGraw-Hill

After the hearing was closed, it came to McGraw-Hill's attention that arbitrator Cowan had expressed an opinion to Augusta Software Design, Inc. (McGraw-Hill's opponent in another dispute over an agreement similar to Postlewaite's) that in the absence of an exclusionary clause, the royalty requirements would include a sale of assets. Concerned about Cowan's impartiality, McGraw-Hill sent the AAA four agreements it had with Augusta (none with an exclusionary clause) to show the identity of the issue with the one on which Cowan had opined. There was also another agreement with Augusta, very recently executed, which did have the exclusionary clause about which Winter had testified at the hearing. Farley did not include that one, because it was not in his office at the time and was immaterial to the point he was making.

Postlewaite's argument that it was deceptive to "withhold" the fifth agreement is baseless. It was not germane

to the issue of Cowan's opinion, and the arbitrators already knew, from Winter's testimony, of the existence of such clauses.

D. Allegations that Arbitrator Cowan Was Biased

When Postlewaite opposed the motion to nullify the hearing and appoint a new panel, he knew all of the grounds for Cowan's claimed bias. Objecting to the AAA even inquiring into the issue, he waived his claim of bias, and must accept the consequences. As stated in *AAOT Foreign Economic Ass'n (VO) Technostroyexport v. International Dev. and Trade Servs., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998): "The settled law of this circuit precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered."

CONCLUSION

Petitioner's motion is denied. Respondent's motion is granted. The Clerk shall enter judgment confirming the arbitration award.

So ordered.

Dated: New York, New York
October 26, 1998

LOUIS L. STANTON
U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 19, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Nineteenth day of June two thousand one.

Dkt No: 99-7032

Postlewaite,

Plaintiff-Appellant,

v.

McGraw-Hill, Inc.,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant.

Appendix C

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX D — STANDARDS EMPLOYED BY THE CIRCUIT COURTS OF APPEALS REGARDING THE APPLICATION OF THE "MANIFEST DISREGARD OF THE LAW" DOCTRINE

Circuits	"Violates the Law	"No Colorable Basis"	Intentional Disregard of Well-Defined Law"	Disregard of Well-Defined Law Resulting in Significant Injustice"	"No Court Would Arrive at that Result"
FIRST			X		X
SECOND		X	X		
THIRD		X			
FOURTH			X		
FIFTH				X	
SIXTH			X		X
SEVENTH	X				
EIGHTH			X		
NINTH		X			
TENTH		X	X		
ELEVENTH			X		
D.C.			X		
FEDERAL		X			